Childress Buick *and* Transport and Delivery Drivers, Warehousemen and Helpers Local Union 104, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 28-CA-6573

7 June 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 11 March 1983 Administrative Law Judge William L. Schmidt issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief and cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Childress Buick, Phoenix, Arizona, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In finding that employees Reynolds and Vitale were discharged in violation of Sec. 8(a)(3) and (1) of the Act, we do not rely on any failure by the Respondent to claim that Reynolds and Vitale were not putting forth their best efforts. We also do not find it necessary to rely on *Standard Coosa-Thatcher Co.*, 85 NLRB 1358 (1949), which the judge quoted in fn. 11 of his decision, to find in agreement with the judge that Childress coercively and unlawfully questioned Beian about her reasons for supporting the Union.

Chairman Dotson would not find that the Respondent's president Childress unlawfully solicited employee grievances at the employee meeting of 27 April 1981. The Chairman also would not find that the Respondent's cancellation of its steak fry was violative of the Act.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. This matter was heard by me on April 13-16 and 20, 1982, at Phoenix, Arizona. The charge was filed by Transport and Delivery Drivers, Warehousemen and Helpers Local Union 104, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union) on July 29, 1981,[1] alleging that Childress Buick (the Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). A complaint was issued by the Regional Director for Region 28 of the National Labor Relations Board (the Board) on September 4 alleging that the Respondent violated Section 8(a)(1) and (3) by various actions including the discharge of two employees, Donald R. Reynolds and Frank Vitale. The Respondent filed a timely answer denying the commission of the alleged unfair labor practices.

On the entire record in this matter, my observation of the witnesses as they testified at the hearing, and my careful consideration of the posthearing briefs filed by the General Counsel and the Respondent, I hereby make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, an Arizona corporation, is engaged in the retail sale of new and used autos at its Phoenix, Arizona place of business. In the calendar year preceding the issuance of the complaint, the Respondent derived gross revenues in excess of $500,000 from its retail business operations and purchased goods from suppliers valued in excess of $50,000 which were shipped to it directly from locations outside the State of Arizona. The Respondent is an employer within the meaning of Section 2(2) of the Act engaged in commerce or a business affecting commerce within the meaning of Section 2(6) and (7) of the Act. It would effectuate the purposes of the Act for the Board to assert its jurisdiction over the labor dispute involved here.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Respondent is franchised as a Buick dealership in Phoenix, Arizona, owned primarily by its president, George Childress. The other principal managerial officials who were involved in this proceeding were James Blue, vice president and general manager; Harvey Hawthorne, sales manager; Norman Mike Majercin, business manager; Earl Grobstein, service department manager; and Jan Larimer, used-car manager.

The Respondent's letterhead describes the auto dealership as "the friendliest place in town" and among the automobile salesmen involved here, Childress Buick was known to be a low-keyed place to work. Some compared the work atmosphere to that of a country club. Several of the Respondent's managerial personnel who testified took pride in the Respondent's reputation and there are

[1] Unless specified otherwise, all dates hereafter refer to the 1981 calendar year.

several indications that the Union's organizing drive served to abruptly change the atmosphere. However, to the extent that the Respondent's management was offended by that action on the part of its sales employees, the employees were equally offended by what they perceived as the precipitous announcement by Hawthorne at a late March sales meeting that the Respondent was embarking on a new compensation plan for the sales employees.[2] The employees protested at the time and Hawthorne said the matter would be reconsidered and that he would let them know later what was decided. At a later sales meeting in April, Hawthorne informed the employees that the compensation plan had been reconsidered and that it had been placed into effect effective April 1. The sales staff reacted swiftly. Contact was made with the Union, a brief organizing drive was set in motion, and the Union sought an election. As will be discussed in greater detail below, the Union was selected to represent the Respondent's sales personnel but no evidence was proffered at the hearing about the progress of collective bargaining mandated by the Act.

The General Counsel argues that the Respondent undertook to thwart the Union's organizing drive by various unlawful actions including a variety of threats, coercive interrogations, efforts to convey the notion that employee union activities were being closely watched, discharges, rescinding management actions which motivated the employees to seek union representation, and other actions of a retaliatory nature. The Respondent claims that it is innocent of the charges leveled against it by the General Counsel.

B. *Chronology of Relevant Events and Findings Concerning the Independent 8(a)(1) Allegations*

As spring 1981 approached, life at Childress Buick seemed fairly normal. Leon Cooper had been assigned the task of making the arrangements for the semiannual steak-fry. By late March, Cooper had reserved a covered space for this event at Phoenix's Squaw Peak on May 30.

However, there were storm clouds. At a sales meeting in March, Sales Manager Hawthorne had announced that a new pay plan and a new-used car warranty plan were under consideration. After Hawthorne had detailed the respective plans to those present, several of the sales persons personalized the new plans by computing its effect on their pay. Most did not like the result. Hawthorne agreed to reconsider the matter after hearing several protests. At a later sales meeting in April, Hawthorne announced that the proposed compensation plan had been placed in effect as of April 1. This news caused the Respondent's salespersons to react favorably to the suggestion that they unionize and efforts in this direction materialized rapidly. On April 22, all of the Respondent's sales folks signed authorization cards for the Union to represent them. The following day, April 23, the Union petitioned the Board's Regional Office in Phoenix for a representation election in which it intended to demonstrate its majority standing under the Act. Apparently the first that the Respondent's management learned of the unionization effort occurred when a copy of the Union's election petition was received from the Regional Office on April 24.

The first sales meeting after Childress received the election petition was held on April 27. There is uniform agreement among the witnesses that George Childress made one of his infrequent appearances at this meeting and addressed the gathering. Nearly all witnesses agreed that Childress was visibly upset and he conveyed the depth of his disturbance at the very outset of his talk to the assembled group by telling them that the only thing which would have shocked him more would have been papers advising him that his wife was seeking a divorce. Childress reminded the employees that the dealership had a reputation as the friendliest place in town to work, that it had always been a country club, that now things were going to change, and that from hereon there would be no special favors. Childress continued. He reminded Bob Peterson that the dealership stood behind him even after it was discovered that he was hiding used-car trade-ins. Childress, most of the witnesses agreed, referred to Peterson's conduct in this regard as being equivalent to that of a "thief."[3] Childress also reminded salesman Dick Bender that the dealership had "stuck by him" even though he was once a "drunk" and later when he had had a heart bypass operation. In neither instance, Childress reminded the group, had the employee been terminated. Childress then stated that the dealership had taken Norma Beian "off the street" and made her into a competent salesperson. Childress then observed that "this" (apparently meaning the Union's petition) was the "thanks" he got. Childress remarked that his door had always been open and he asked the employees what their problems were—whether it was with the management, the pay plan, or what. No one responded. Next, Childress told the employees that the Union only could obtain for them things he would be willing to agree to and that although he would bargain in good faith, he would agree to nothing and that he would never sign a contract.[4] After Childress had finished addressing the group and had left the room, Hawthorne addressed the group and asked why the employees had not come to him if they had a problem. When Hawthorne had finished, Frank Vitale asked Hawthorne why everyone was so shocked because the salesmen wanted to organize since, as he had observed in talking with Keith Leathers (a colleague) a few days before, almost all of the work

[2] The sales meeting referred to here and at other places in this decision refers to the regularly scheduled meetings held twice weekly involving the sales staff.

[3] Peterson's conduct deprived other sales personnel of the opportunity to sell the trade-ins and reap any resultant commissions.

[4] The only serious credibility issue which arose concerning this meeting involved whether or not Childress asserted that he would not sign a contract. Several of the General Counsel's witnesses so testified. Childress denied that he made the remark. Several witnesses called by the Respondent were not questioned in an effort to corroborate Childress' denial in this regard even though they testified about other aspects of the April 27 meeting. As several of the employee witnesses who are still employed at the Respondent's dealership testified that Childress made such a remark and as the tenor of Childress' other remarks are reflective of a deep personal animosity toward unions in general, I am persuaded that such a remark would not be out of character. Accordingly, I find that Childress did state that he would never sign an agreement at this meeting.

performed on an automobile before it arrived at the showroom floor was done by unionized personnel. According to Vitale, Hawthorne appeared quite upset by his unsolicited remarks.

On the basis of the foregoing, I find that Childress' remarks at the April 27 meeting were tantamount to threatening retaliation against employees, that he solicited grievances, and that he sought to convey to employees the futility of collective bargaining. In so doing Childress violated Section 8(a)(1) of the Act. I further find that Childress' remarks coupled with his admitted demeanor disclose that he harbors a deep personal hostility toward unions. This latter finding is highly pertinent to the question of the Respondent's motive discussed later.

Shortly after the April 27 sales meeting Norma Beian, one of the new-car salespersons, went to Hawthorne's office. Apparently Hawthorne was not present at the time but Majercin was in Hawthorne's office and at this time Majercin asked to speak with Beian. When Beian agreed, Majercin began by saying that he had just learned of the organizing drive by the sales staff. Majercin asked Beian why she would want to go to the Union instead of approaching Childress with any complaints which she had. After Beian responded, Majercin pressed on saying that the employee problems could be handled without a union. Majercin suggested that two of the employees go to Childress concerning various matters such as the new pay plan and a scheme to rate the Respondent's managers. In addition, Majercin told Beian that Childress would never sign a union contract, that he would rather sell the place first. For his part, Majercin (who testified that he was "really hurt" by the organizing effort) acknowledged speaking with Beian about this time because he was "trying to find out why they did not go to Mr. Childress direct on their problems . . . the point [being] if we can go into Mr. Childress maybe we can get everything settled." Majercin claims that he asked Beian if she were the union steward because—in effect—he was attempting to find out if she would be the person to represent the employees. I have credited Beian's recollection and recitation of what transpired in this conversation over that of Majercin. Certain of Majercin's assertions are simply too self-contradictory to merit belief. For example, Majercin's testimony that he was "deeply hurt" by the organizing effort makes it highly unlikely that his inquiry as to whether or not Beian was the union steward was for an innocent purpose of generating a problem-solving discussion. As I have credited Beian's version of this conversation, I find in agreement with the General Counsel that Majercin violated Section 8(a)(1) of the Act by his effort to solicit employee grievances with the implicit promise that they would be resolved[5] and by his remark that Childress would rather sell the dealership than sign a union agreement.

On May 1 Reynolds and Vitale were called separately to Hawthorne's office and were warned about their production. Reynolds testified that when he was called to Hawthorne's office, Hawthorne closed the door and initiated the conversation by saying that Childress knew nothing of the pay plan before it was implemented as the pay plan was his "baby," he had implemented it, and no one else had anything to do with it including Childress who did not know anything about the pay plan until a couple of days before that time. According to Reynolds, the two men sat across from one another for a few moments and then Hawthorne asked Reynolds if he thought Hawthorne was afraid of him. Reynolds replied no and asked Hawthorne the same question and received the same response. Hawthorne then told Reynolds that he had 30 days to get his production up. Additionally, Hawthorne gave Reynolds a "house deal" and the conversation ended.[6]

Vitale claimed that he learned that he was being put on probation when he went to Hawthorne's office to log a sale. At this time Vitale said that Hawthorne laughed and remarked that the particular sale might help get him off probation. Vitale remarked that he did not know what Hawthorne was talking about and Hawthorne did not bother to respond. By contrast, Hawthorne testified that he had had two previous conversations with Vitale in January and February about Vitale's lack of production; during those conversations Vitale told Hawthorne that Vitale did not like his sales figures anymore than Hawthorne did and that he was trying to bring them up. According to Hawthorne, on May 1 he called Vitale to his office again and told him that he had to have some improvement in his sales in 30 days or he would terminate him. Vitale was also given a house deal to start off on the right foot during his probationary period.

Apparently sensing that the source of the unrest among the salesmen was the new pay plan and the warranty plan change, the changes which had been put into effect on April 1 were rescinded in the early part of May. Blue testified that at a sales meeting on May 4 he announced that the dealership was going to rescind the changes. Blue's explanation for this action was as follows:

> Well that we felt that after the month that we'd had, we'd waited to see exactly how the salesmen came out as far as their commissions were concerned and felt that the pay plan had not worked out as we had thought that it would, and that we were returning to our old pay plan that we'd used previous to this new one.

As to the warranty plan Blue explained:

> Well, I think I stated in the meeting that the used car salesmen primarily were not happy with that program. They felt that it was costing them money rather than making the car easier to sell. And because of that we would revert back to the previous method we had as we were doing with the new car commission plan.

[5] *Uarco, Inc.*, 216 NLRB 1 (1974).

[6] A "house deal" is a sale arranged with the management. In effect, Hawthorne was crediting Reynolds with the sale. The General Counsel alleged that the Respondent discriminatorily discontinued allocating house deals. That allegation is treated in sec. B, below.

After initially denying that it was his view that the employee unionization efforts resulted primarily from the change in pay plan, Blue eventually acknowledged that so far as he knew the only reason the employees sought union representation was because of the pay plan and that the conclusion was reached to rescind the April changes in the pay plan after consulting with the dealership's labor counsel.

Childress, Hawthorne, and Blue all testified that Childress put in an appearance at the April 23 sales meeting and told the employees, in effect, that if the plan was unsatisfactory after a month the Respondent would "do something about it" (Blue); or "would go back to the old pay plan" (Hawthorne); or would "discuss it" (Childress). The Respondent called Peterson, Goorhouse, and Fleitz (who were on the Respondent's sales staff at the time) to support the testimony of its managers. All of the latter individuals testified that Childress stated, in effect, at the April 23 meeting that he had learned of some union activity in the Phoenix area and of some dissension among his own sales staff. They testified that Childress stated that he would be "willing to take a close look at the commission structure" (Peterson); or would "look [the pay plan] over between now and the end of the month, and . . . change it back if you're not satisfied" (Goorhouse); or "if [the pay plan] didn't work, the 1st of May it would be canceled out" (Fleitz). The day following the April 23 sales meeting, the Respondent was served with a copy of the Union's petition for an election.

The foregoing evidence demonstrates that the Respondent was motivated to reconsider its recent changes in its compensation plans because it had learned of the union activity among nearby auto dealerships and that it undertook to reinstitute the old compensation plan after it learned specifically of the organizing campaign underway among its own sales force. As the Respondent implemented the new compensation plans over the strong objections of its sales employees only a short time earlier and expressed a willingness to reconsider the changes it had made only after it learned of nearby activity by the Union, it is reasonable to infer, as I have, that the Respondent rescinded the changes made in its pay structure in order to appease its employees and discourage them from continuing their support of the Union. Accordingly, I find in agreement with the General Counsel's allegation that the Respondent's announcement that it was rescinding the changes made in its compensation plans violated Section 8(a)(1) of the Act. *Don Moe Motors*, 237 NLRB 425 (1978). Accord: *NLRB v. Anchorage Times Publishing Co.*, 637 F.2d 1359, 1367 (9th Cir. 1981).

In addition, in this same period of time the spring steak-fry was canceled.[7] Hawthorne testified as follows about this matter:

> Q. Let me just review the complaint here one minute. Did you have anything to do with the canceling of the steak fry?
>
> A. I think that was a mutual agreement amongst everyone. It didn't seem like it was the right time to go out and have a party when there was so much animosity going on and tension in the whole store, why I don't think I'd want to go out and sit in—having dinner and a few drinks when the atmosphere was as it was at that time.
>
> Q. What was that, contentious and divided?
>
> A. Yes.
>
> Q. And kind of heated arguments and things?
>
> A. Yes.
>
> Q. Brought about by the Union campaign, right?
>
> A. Yes.
>
> . . . .
>
> Q. Mean the atmosphere was brought upon by the Union campaign?
>
> A. Yes.

None of the other witnesses who testified about the matter confirmed that the cancellation occurred by "mutual" consent and it is my conclusion that Hawthorne's choice of words was only a euphemism designed to avoid stating the obvious, namely, that the steak-fry cancellation decision was made unilaterally by the Childress management.

In apparent accord with Childress' warning at the April 27 sales meeting to the effect that the dealership operation was going to be tightened, there is evidence that at a sales meeting in early May, a copy of the existing policies and procedures originally distributed in October 1980 was again distributed and Childress informed the sales personnel to become familiar with and adhere to those rules. Theretofore strict compliance with the October 1980 rules and regulations was neither achieved nor expected.[8]

Throughout May the Respondent was campaigning against the Union in anticipation of the NLRB election which was set for June 3. Three of the Respondent's campaign documents are in evidence. In them, the Respondent advised employees:[9] (1) that no one could be fired because of the way they vote; (2) what "checkoff" meant; (3) that employees could not deal with Childress or Blue about the pay plan or other working conditions if the Union won; (4) that the Union had no collective-bargaining agreement for any auto sales personnel in the Phoenix area; (5) that PROD was a group of Teamsters rank-and-file members trying (albeit unsuccessfully) to get rid of the Mafia influence in the Teamsters Union; (6) that employees can be replaced for going on strike; (7) that employees did not have to (and the Respondent hoped they would not) vote for the Union simply be-

[7] Vitale was the only witness who attempted to place the timing of the steak-fry cancellation. He testified that it was canceled "[a]fter we had signed the petitions for the Union, shortly thereafter . . . I don't recall if it was in the meeting room or on the floor."

[8] This finding is based on Norma Beian's testimony. Although the scenario depicted by Beian was not contradicted by the Respondent's witnesses, it was not fully corroborated by other witnesses of the General Counsel. Thus, Vitale testified that Majercin put copies of the rules on their desks. Reynolds' testimony on this subject was that he overheard Majercin's warning to two other salesmen to strictly adhere to the rules. Nevertheless, the Respondent's brief states, "Childress Buick decided for sake of boosting sales, that both management and employees would abide by rules and regulations in effect since 1980."

[9] The Respondent's campaign literature was not alleged to be unlawful but it is, nevertheless, relevant to the question of motive. *NLRB v. Lowell Sun Publishing Co.*, 320 F.2d 835, 839–840 (1st Cir. 1963).

cause they signed a union authorization card; (8) that a "yes" vote was not a pay raise guarantee; (9) that the Respondent would bargain "tough" if the Union won the election—the law did not require the Respondent to make concessions or to agree to all union demands; (10) that strikes can vary in length from a few hours to years and that in the event of a strike the employees would not be eligible for unemployment compensation and could be replaced; (11) that the Respondent would not close because of the Union; (12) that bargaining could last a long time depending on how tough each side bargained; (13) that the Respondent did not have to sign an agreement which it did not believe was in its own best interest; (14) that employees could end up with more or less than what they presently had as a result of the bargaining process because the bargaining process involved both give and take; (15) that strikes were used by unions to compel agreement with their demands and one local strike had lasted for over 3 years; (16) that employees were not paid for striking and were not eligible for unemployment compensation; (17) that the Respondent had the right to (and intended to) operate during any strike using permanent replacements; (18) that it apologized to employees for the "breakdown in communications"; and (19) that management had learned many lessons as a result of the Union's campaign, a "therapeutic experience."

During the month of May, Vitale sold five new automobiles. This record was the lowest for any salesperson for that month. On June 1, Vitale was informed by Hawthorne that he was being terminated for his low production. Shortly after learning of his termination, Vitale went to Childress' office and told Childress that he had enjoyed working for the dealership; that he desired to continue working there; and that he would not take his termination lying down. Childress did not respond to Vitale's pique; instead, he engaged Vitale in small talk about his future plans. Later in the day, Vitale went to Blue's office after observing Blue and Childress talking together there. At this time, Vitale told Blue that he did not think the timing of his termination could have been worse coming as it did 2 days before the election. This action, Vitale speculated, would sway the way the others voted. Blue responded that it would not make any difference as the salespersons had already made up their minds about voting. The Respondent did not explain Vitale's discharge to the sales force.

The following day, June 2, Reynolds was ushered to Childress' office by Hawthorne. At this time, Childress told Reynolds, "Don, normally when people aren't happy at Childress Buick, we allow them to look for a job elsewhere." When Reynolds responded that he was, in fact, happy at the dealership, Childress replied that he did not act like it and that he had 15 days to get his production up or he would be better off looking for a job elsewhere. During the month of May, Reynolds had received credit for the sale of seven new automobiles. Reynolds' credited sales for May were equal to or greater than those for salespersons Collins, Goorhouse, Gunsalus, Jonovich, Leathers, Nixon, and Vitale. Those individuals together with Reynolds represent practically half of the Respondent's new- and used-car sales force. The Respondent's sales and salary reports for the month of April likewise indicate that there were several other of the Respondent's salesmen at or below Reynolds' production record.[10] Other than Vitale who was placed on probation and then discharged, and Reynolds, who was placed on probation and warned by Childress, there is no evidence that any of the other salespersons were warned or placed on probation as a result of their production records for the months of April or May.

The election was held on June 3. The tally of ballots disclosed that nine votes were cast for the Union and seven votes were cast against the Union. Respondent filed objections which were subsequently overruled. The Union was certified on September 18, 1981.

The day after the election (June 4), the Respondent held one of its regular sales meetings. After Childress finished addressing the group and another individual was preparing to talk to the assembled salespersons, Childress walked over to an empty seat between Reynolds and Jonovich to sit down. At this time Childress remarked (in a jocular manner according to Childress), "I'll just sit here between these two union men." Although the remark indicates that Childress identified or associated those two individuals with the Union's organizing drive, the General Counsel goes further by alleging that the remark put employees on notice that the union activities were being kept under close surveillance in violation of Section 8(a)(1) of the Act. The plain meaning of the word surveillance connotes that one's activities are being closely watched, a label which is clearly inappropriate for the circumstance occurring here. Absent the General Counsel's ability to classify Childress' remark in the "impression of surveillance" category, the remark by Childress has no coercive quality. A particular type of conduct is not unlawful because of the General Counsel's ingenuity (or lack thereof) in attaching a label to it. Accordingly, I shall recommend that, to the extent that complaint paragraph 14(p) alleges that Childress' remark on this occasion was unlawful, it should be dismissed.

In the following 2 months there were other conversations between acknowledged supervisors and sales employees which have been alleged as unlawful acts of interference, restraint, or coercion. The first of these allegations concerns a conversation between Childress and Beian in Childress' office which, according to Beian, occurred about a week after the election. Beian testified that she went to Childress' office on this occasion to voice her view that the management had adopted an uncooperative and distant attitude which was lowering the sales morale and affecting the automobile sales. Beian said that Childress observed that the sales force had "asked for it" and that things were going to be more formal. Childress asked why Beian voted for the Union and she replied that she wanted the Union for income protection and job security. Childress responded that the Union could only obtain for employees those benefits that he decided to give; that the Union would probably sign a contract right now for what the employees al-

[10] See Appendix A for a summary of the individual sales and earnings records.

ready had if he was willing to do so: that he was not going to let an "outsider" tell him how to run his business; and that he intended to spend all the money necessary to keep the Union out. Childress acknowledged that this conversation occurred and his version differed only slightly from the version by Beian which I have credited. Thus, Childress testified that, in response to Beian's complaint that management was being unfriendly and uncooperative, he told her that the employees had made the decision to get outside help and, as a consequence, management was going to toughen up. Both management and employees, Childress said, were going to have to live up to the published rules from that point forward. On the basis of this conversation, the General Counsel seeks a finding that the Respondent violated Section 8(a)(1) of the Act by interrogating Beian and by making threats of more onerous working conditions. The General Counsel's position is well taken. I find that Childress' remarks at this time violated Section 8(a)(1) of the Act as alleged by the General Counsel.[11]

About a week after the election Keith Leathers was walking through the service department when Grobstein approached him and stated: "Now if we can get rid of Norma and Reynolds, we'll have the Union thing whipped." Leathers said that Grobstein made a similar remark to him a week or two later. Grobstein denied making such a remark. Instead he attributed a similar remark to Reynolds, who credibly denied having made any such remark.[12] The General Counsel contends that Grobstein's remark is tantamount to an unlawful threat to terminate the union supporters. I agree. Grobstein's message clearly conveys the views of a supervisor that the Respondent might consider using the discharge device in order to disrupt the employees' union activities. Such remarks are clearly coercive and would have the effect of restraining an employee. Accordingly, I find Grobstein's remarks to Leathers on these occasions violated Section 8(a)(1) of the Act.

On June 10, Reynolds approached Leathers and Gunsalus on the showroom floor at a particular time when Grobstein was speaking to the latter two individuals. As Reynolds approached the assembled group, he overheard Grobstein say that Childress would never sign a contract—that he would close the door and turn the key. Gunsalus supported Reynolds' testimony saying that it was his recollection that Grobstein said that if the Union got in Childress would probably close the door. Grobstein asserted that he told the employees that it was "his opinion" that if the place ever went union Childress would just close the business down. The General Counsel asserts that, regardless of whether the remarks represented Grobstein's own opinion or not, they are clearly attributable to the Respondent because of Grobstein's position as a supervisor and that they interfered with the employees' Section 7 rights.[13] I agree. On the basis of the credited testimony of Reynolds and Gunsalus, it is my conclusion that Grobstein's remarks on this occasion violated Section 8(a)(1) of the Act as the statement about closing is clearly coercive.

In or about mid-June, Hawthorne made a reference to Reynolds about people not being cooperative and then said, "Don, at least I know where you stand." Reynolds responded with "That's true, Harvey." Hawthorne continued by saying that there were certain people who were trying to play both ends against the middle and Reynolds responded, "Yes, Harvey, and we know who, don't we?" Hawthorne answered, "We sure do." The General Counsel believes that this oblique conversation was an intentional and unlawful effort on Hawthorne's part to let Reynolds know that employee union activities were being kept under surveillance. In support of his argument, the General Counsel points to Hawthorne's testimony that he had no doubt in his mind but that Reynolds was a union supporter. However, the evidence as recited above is not sufficient to establish that Hawthorne's remarks even had any reference to employee union activities. In these circumstances, it is my conclusion that to the extent the General Counsel alleged the foregoing conversation as a violation of Section 8(a)(1) of the Act in paragraph 14(m) of the complaint, the evidence proferred in support of that portion of the complaint is too ambiguous to establish that Hawthorne was attempting to create an inpression of surveillance. Accordingly, I will recommend that paragraph 14(m) be dismissed.

Gunsalus resigned on June 15. When he left there was a vacant office in the section situated along the showroom floor. These offices were deemed more desirable than the hallway offices which are off the showroom floor. The showroom floor offices have traditionally been made available to the more senior salespersons employed by the Respondent. At the time that Gunsalus left, Leathers was next in line for a showroom floor office. However, Hawthorne assigned the Gunsalus' office to a new salesman named Smith who had only worked for the dealership for about a week. A day or two after the office assignment was made, Leathers went to Hawthorne and complained bitterly about not being given the Gunsalus' office. Hawthorne told Leathers that because of the union matter he was not going to do anybody any favors anymore. Nonetheless, Leathers was assigned to the office the following day and Hawthorne denied having made the statement attributed to him by Leathers to the effect that he was not going to do anybody anymore favors because of the Union. According

[11] Long ago the Board noted in *Standard Coosa-Thatcher Co.*, 85 NLRB 1358 (1949), that an employer's curiosity concerning an employee's union activity rarely lacks purpose. There the Board observed (at 1362):

> Our experience demonstrates that the fear of subsequent discrimination which interrogation instills in the minds of employees is reasonable and well-founded. The cases in which interrogated employees have been discharged or otherwise discriminated against on the basis of information obtained through interrogation are numerous. These cases demonstrate conclusively that, by and large, employers who engage in this practice are not motivated by idle curiosity, but rather by a desire to rid themselves of union adherents.

[12] Reynolds' denial is credited because it is consistent with the total circumstances showing that he remained a prounion employee until his termination. Hence it is inconceivable that he would talk about his own termination so that the Respondent would have the union matter, in effect, "whipped."

[13] The General Counsel relies on *Valley Iron & Steel Co.*, 224 NLRB 866, 874 (1976), for the proposition that statements made by a supervisor are presumptively imputable to the supervisor's employer.

to Hawthorne, he could not have made such a statement because he did not know how Leathers had voted. Other testimony by Hawthorne leads me to conclude that his denial is not worthy of credit. Thus, Hawthorne admitted that he gave the office to Leathers after talking to Blue even though he does not normally consult with Blue prior to making an office assignment. Moreover, Hawthorne acknowledged that Blue and he had decided that Hawthorne was being "kind of kiddish." Hawthorne said that he had afterthoughts about not assigning the office to Leathers because that action was a spur of the moment type of thing. According to Hawthorne, his "kiddish" action resulted from "the tensions, the atmosphere, in the store was pretty strong at the time, and you know, that'd be how I'd have to discuss it." The atmosphere which Hawthorne was referring to was a result of the organizing campaign.[14] On the basis of the foregoing evidence, I find that Hawthorne's advice to Leathers that he was not going to do anyone any more favors because of the Union in the context shown here violated Section 8(a)(1) of the Act, as alleged.

About 2 weeks after the election, Childress went to the used-car department and spoke individually with the salesmen in that department at the manager's office. Childress told used-car salesman Jonovich that he could not understand why Jonovich was one of the individuals who went along with the Union. While Jonovich was present Childress looked over his sales record and observed that he would not hire him if he had to at that particular time because of his recent past performance. Childress also noted that Jonovich had a record of jumping from one dealership to the next. When Childress testified concerning this conversation with Jonovich, he corroborated portions of Jonovich's testimony about the matter and embellished on it. Thus, Childress testified that he told Jonovich that he had jumped around among different dealerships and had even been a sales manager. Childress said he told Jonovich he could not understand why he felt he needed a union when in the past he had always talked directly to Childress if there was some complaint. Childress said that he told Jonovich that he had been the top used-car salesman for a number of years but that his record over the past 6 months was such that if he had to do so at the present time he would not hire Jonovich. According to Childress, Jonovich stated that he could not blame him for that. Childress testified that he then chided Jonovich to stimulate his business. Childress asked Jonovich what he really wanted and what he felt the Union could do for him to which Jonovich responded by saying that he did not want to discuss that matter. Childress testified that he had similar conversations with Collins and Coughlin, the other used-car salesmen. The General Counsel asserts that Childress' action amounted to an unlawful interrogation of the used-car salesmen, a solicitation of their grievances, and threats of adverse action, motivated by the employees' union activities. I agree. Childress' admitted statement that he asked Jonovich what he really wanted and what he thought he could get from the Union is a clear solicitation of Jonovich's grievances by means of the interrogation device which had as its purpose an effort to learn about Jonovich's union sympathies. The fact that Childress felt it necessary to call Jonovich's reduced production to his attention in the course of the same conversation leads to the clear inference that Childress' purpose was to convey the impression to Jonovich that his job security was in jeopardy in circumstances where it would be reasonable for Jonovich to infer that the reason his job was jeopardized was because of his desire to be represented by a union. Accordingly, I find that as a result of the mid-June conversations with the used-car salesmen Childress violated Section 8(a)(1) of the Act by unlawfully interrogating employees about their union sympathies, soliciting grievances, and conveying the impression that the employees' union activities had placed their jobs in jeopardy.

On June 25, Reynolds was scheduled to make a new-car delivery to a customer named Cordovana. The customer was due at the dealership at 7 p.m. in order to take possession of his new automobile. The get-ready department made the car available to Reynolds at approximately 6:15 that evening and, in accord with the required practice at the dealership, Reynolds took the automobile for a test drive to make sure that all systems were working properly. In the course of the test drive, Reynolds noted that the gas gauge was on the empty mark. It was the custom of the dealership to deliver a new automobile with approximately 10 gallons of gas in it which would make the typical tank from one-fourth to one-half full. Reynolds testified that there was a procedure which he could have utilized in order to obtain gasoline for the automobile which required him to go to the "gas board" in Hawthorne's office. According to Reynolds, he felt there was insufficient time to follow this procedure so he went directly to the used-car get-ready manager Darrell Wubben, and asked Wubben to put some gas in the car because he had to deliver the automobile to the customer at 7 p.m. Wubben put 4–5 gallons of gas in the tank as he had done on several occasions in the past. The following day Used-Car Manager Jan Larimer approached Reynolds and stated, "What the hell are you doing taking gas out of my tank?" Reynolds testified that he was shocked by Larimer's attitude in view of the number of times in the past that the procedure which he followed the previous evening had been utilized by others. Larimer told Reynolds that he did not want to see it happen again. According to Reynolds, a few days later Leon Cooper, the assistant sales manager, came to his office with a $4.63 back charge for the gas which had been put in the Cordovana automobile. There is no evidence that Wubben was reprimanded in any fashion.

Hawthorne testified that he was on duty the evening that Reynolds was to deliver the Cordovana automobile. According to Hawthorne, Wubben came to him and informed him that Reynolds was putting gas in the Cordovana car. Hawthorne testified that he instructed Larimer to talk to Reynolds about the matter. To the extent that Hawthorne sought to imply that Wubben approached him for the purpose of reporting some wrongdoing on

[14] Although the election had taken place by this time, as noted above, the Union was not certified until much later in September.

Reynolds' part, Wubben failed to corroborate Hawthorne's assertion in his testimony. Instead, Wubben testified that he was the individual who pumped the gas after Reynolds explained the situation. Wubben testified that he had done the same thing in numerous prior instances for others. There is no evidence that anyone was ever reprimanded for such action before. On the basis of the foregoing, I find that Larimer's oral reprimand of Reynolds which was directed by Hawthorne was, as the General Counsel asserts, merely a form of harassment of Reynolds because of his sympathies for the Union. This conclusion is warranted on the basis of the evidence which demonstrates that the procedure followed by Reynolds had been followed on numerous other occasions in the past without any reprimand, and on the further basis that Wubben, the individual who actually pumped the gas, was apparently not reprimanded at all. I further find that, by back charging Reynolds for the cost of the gasoline, the Respondent violated Section 8(a)(3) of the Act, as this action was motivated by an effort to harass Reynolds because of his union sympathies. My inference concerning the Respondent's motive for this action is grounded on the Respondent's other unlawful conduct during this general period and Hawthorne's lack of candor in explaining the basis for this action.

In the latter part of June, the Phoenix television station affiliated with CBS carried a news segment on the Union's effort to organize auto dealerships in the Phoenix area. Some of the sales personnel from various dealerships and a representative of the Union were interviewed in connection with the station's report. Among those interviewed was Norma Beian from the Respondent's dealership. The day after the interview was telecast, Beian was called to Childress' office. Beian testified that the following exchange took place at this time:

> A. Okay. He called me in and said, "Do you remember those nice T.V. commercials we've made of you? Well, you really blew it, didn't you, doing that T.V. interview." He said, "Why do you want to go—why do you want to rub our noses in it?" He said, "I've had a lot of people ask me why the employees want to go public with this. We have a lot of Sun City people who won't buy from us if they know that we're Union."
>
> He asked me why I would go to the Union. Why I would vote for the Union, and I told him that I felt that the dealership was keeping me from a profession that I love because I was going to be forced to leave under the circumstances, and I went to the Union for job security.
>
> Then he said, "This has always been a friendly place to work. It's like a big family around here. It's never been my policy to let people go for poor production. I've always tried to work with them and help them, but things are going to change now. It's going to be more formal around here."

Childress, who had apparently seen the news report, concluded that it was "not a very good program." His version of the conversation with Beian the following day was as follows:

> So the next day I called her into the office and I said Norma—in the meantime I'd had some telephone calls by people saying well, we didn't know that you had Union salesmen, and I says we do not yet, but there in the process of bargaining, or getting ready to bargain. I told Norma that I didn't think that appearing on television, particularly without us knowing about it was in our best interest nor the company's best interest.
>
> And I felt like, I said Norma, we've made a bunch of TV spots for you in the past. As a matter of fact, we've made some this year, 1982. But at that particular time I said we made these TV spots for you showing what a wonderful place it is to work, and you have fine customers. You get on there and say that we don't particularly treat you right, that you think you need the Union in this organization, I said Norma, I think that's a slap in the face.
>
> She says I have a right to my opinion. I says yes, you do.
>
> Q. Did she say that she was not ashamed of it?
>
> A. Said she was not ashamed of it, and I says well, I can't blame you, I wouldn't be ashamed of it either, but I think it was poorly handled.
>
> Q. At either one of those meetings, did you tell Norma Beian that you would not fire anybody for low production?
>
> THE WITNESS: No. I told Norma that in the past we'd related again some of the problems we'd had with some of the people who had come back and became good salesmen again. That low production, not trying, not greeting the customers, not working, not using the telephone, we just couldn't tolerate, and we would let them go. By not doing those things they would not sell cars, and that was the reason they were let go.

Beian was convincing as she testified about the foregoing incident. For this reason and as her version accords with other similar testimony (for example, Jonovich) concerning Childress' conduct through this period, I find her version to be the most reliable. The General Counsel argues that Childress' remarks at this time involved an unlawful interrogation of Beian and threatened more onerous conditions because of the remarks that the Respondent would be less helpful and tolerant of salespersons having productivity problems. The General Counsel's contention is meritorious. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act by Childress' remarks on this occasion.

On July 2, Beian went to Hawthorne's office to pick up her paycheck. At that time Hawthorne closed the door and engaged Beian in a conversation. First, he congratulated her for being the top producer during the month of June. Hawthorne then said he wished it had been under "different circumstances." Next, Hawthorne asked Beian why she would let Reynolds and Jonovich pull her down to their level. Beian responded that no

one was pulling her anywhere and that she had made up her own mind to vote for the Union. Hawthorne then confronted Beian with the rumor that she wanted him fired. Beian strongly denied that assertion to Hawthorne and the conversation was apparently dropped at that point.[15]

Beian said that same evening or the following evening she confronted Majercin with the assertion that she wanted to have Hawthorne fired because she believed that Majercin was the source of this rumor. Majercin denied Beian's claim but the conversation between them continued with Majercin saying, "Obviously, it wouldn't be a union supporter [who started the rumor] so let's eliminate them." After making this remark Beian said that Majercin proceeded to count the names of nine individuals on his fingers. The General Counsel claims that this counting was done "so as to correspond with the 9 yes votes the Union had received at the June 3 election." The General Counsel asserts that this is but one further instance where the Respondent violated Section 8(a)(1) of the Act by "giving the clear impression that, through the channels of information known to the Respondent alone, it had found out who had cast "yes" votes in spite of the fact that it had been a secret ballot election." In my judgment, the factual and legal inferences drawn by the General Counsel from the context of this conversation between Beian and Majercin are so pedantic, peculiar, and puzzling as to merit no further discussion. Suffice it to say I shall recommend that complaint paragraph 14(g)—which alleges that this conversation violated Section 8(a)(1) of the Act—be dismissed.

On July 6, Hawthorne took Reynolds to Childress' office where the three men met together. Childress asked Reynolds "what the hell" was wrong with his production. Reynolds asserted—without rebuttal of any kind from either of the other two gentlemen—that he was doing everything he could to get business and that in a couple of weeks when Beian and Peterson were on vacation he had planned to fill in for them as he had done in the past years in order to have an extra crack at obtaining business. In fact, the records of Reynolds' production in this period from past years show that it was normally the most productive time of the year for him. Nevertheless, Hawthorne told Reynolds that he preferred to give those hours to the new salesmen who had been hired in June. Reynolds continued to explain his drop in production by telling Childress that the floor traffic had been slow and that he had some personal problems. Childress responded by telling Reynolds that when employees "did not enjoy working there" they were encouraged to find other employment and that Reynolds should do just that. Reynolds denied that he was unhappy and told Childress that he did not want to look for other work—that he wanted to stay and do the best he could. Childress then noted that the Respondent had given Reynolds 30 days to improve his production and two 15-day extensions but that he had not been successful in mustering any improvement in his sales record. Childress told Reynolds that since he would not go voluntarily, Childress would let him know by the end of the week as to whether or not he was going to be let go from his job.

About 11 a.m. on July 10, Hawthorne walked into Reynolds' office and informed him of the decision which had been made to let him go. Reynolds asked for a written termination slip and Hawthorne later provided a slip of paper saying that Reynolds was being terminated for lack of production. At this time Reynolds asked Hawthorne why neither he nor Childress asked about his personal problems in their meeting earlier that week. Hawthorne told Reynolds that he would be glad to listen but, when Reynolds had spoken of personal problems in their earlier conference, Hawthorne assumed Reynolds was referring to his union activities.

A couple of days after Reynolds' termination, Majercin approached Beian and asked if she was now the union steward. Majercin made a similar inquiry of Beian in August after she returned from vacation. At that time Majercin asked Beian if she knew who the union steward was. The General Counsel alleges that these inquiries were unlawful interrogation which violated Section 8(a)(1) of the Act. From the evidence before me, I find that these terse inquiries lack the requisite coercive element and, accordingly, I shall recommend that the complaint be dismissed in this regard.

In mid-July Vitale telephoned Grobstein to make arrangements for service on his personal automobile. In the course of their telephone conversation at this time, Grobstein remarked to Vitale that Childress most likely would close or sell the dealership if there was a union contract "presented." Vitale's testimony about this incident was not contradicted by Grobstein. Accordingly, I find that Grobstein's statement at this time is one further transgression of Section 8(a)(1) of the Act as it is an unsupported coercive statement that a union contract would or could result in the closing of the dealership. *NLRB v. Gissel Packing Co.*, 396 U.S. 804 (1969).

C. *Additional Findings and Conclusion with Respect to the Other Alleged Violations of Section 8(a)(3)*

The General Counsel has alleged that the Respondent violated Section 8(a)(3) of the Act by its conduct in placing Reynolds and Vitale on probation on May 1; by placing Jonovich, Leathers, and Nixon on probation in early July; by discharging Vitale on June 1 and Reynolds on July 10; by withholding moneys from the commission check of Reynolds solely as a result of the Cardovana automobile incident about June 25; by canceling the steak-fry scheduled for May 30; and by withholding "house deals" from union supporters.

The parties vigorously dispute the discharges of Reynolds and Vitale. The Respondent correctly notes that union or concerted activity does not serve to shield an employee from lawfully motivated discipline, *NLRB v. Anchorage Times Publishing Co.*, supra; *NLRB v. Park*

[15] In her testimony about this conversation, Beian made a reference to the fact that this conversation may have involved a discussion between Hawthorne and herself concerning Reynolds' production and the fact that several other individuals' production had dropped considerably from what it had been the previous year. However, as Beian expressed some uncertainty that this matter was discussed at this time and as the matter was not later cleared up or broached in any fashion, I make no finding with respect to any such conversation between Beian and Hawthorne concerning production.

Edge Sheridan Meats, 341 F.2d 725 (2d Cir. 1965). On the other hand, an employee's comparatively poor production record does not provide an employer with license to mete out disciplinary action where such action is, in fact, motivated by the Respondent's animus for the employees' protected activities. In essence, the issue with respect to all of the 8(a)(3) allegations of the General Counsel's complaint boils down to whether or not a preponderance of the evidence establishes that the Respondent's motive for actions which it took was tainted in any substantial part by its opposition to the unionization of its sales force.

Section 8(a)(3) and (1) of the Act are violated if an employer discharges or otherwise discriminates against an employee because of the union activities of its employees. *Great American Sewing Co. v. NLRB*, 578 F.2d 251 (9th Cir. 1978); *NLRB v. El Dorado Club*, 557 F.2d 692 (9th Cir. 1977); *NLRB v. Coast Delivery Services*, 437 F.2d 264 (9th Cir. 1971). Hence, absent unusual circumstances not relevant here, the crucial determination which must be made in cases involving discrimination within the meaning of Section 8(a)(3) of the Act is factual, i.e., what is the actual motive for the employer's action which the General Counsel alleges to be discriminatory? *Hambre Hombre Enterprises v. NLRB*, 581 F.2d 204 (9th Cir. 1978); *Sante Fe Drilling Co. v. NLRB*, 416 F.2d 725 (9th Cir. 1969). Direct evidence of an antiunion motive is rare and, for that reason, reliance on circumstantial evidence and the reasonable inferences which may be drawn therefrom is not only permissible, most often it is necessary. *Hambre Hombre v. NLRB*, supra; *NLRB v. Warren L. Rose Castings, Inc.*, 587 F.2d 1005 (9th Cir. 1978). It is seldom that an employer will supply direct evidence concerning its state of mind in cases of this nature which is not also highly self-serving. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966).

Recently, in *Golden Day Schools v. NLRB*, 644 F.2d 834 at 838 (9th Cir. 1981), the Ninth Circuit cautioned:

> Self-serving declarations by [the company's] management personnel regarding their motivation are not conclusive. Indeed, when [it is determined] that such declarations are untrue, the false assertions of lawful purpose support the inference that the declarants' motive was unlawful.

Under the analytical approach which I am bound to follow, the General Counsel has the burden of proving that an employer's adverse action against his employees was discriminatorily motivated. If the General Counsel is successful in proving a prima facie case of discriminatorily motivated conduct, the employer then has the burden of showing that the adverse action would have occurred even if the employee (or employees) had not engaged in the protected activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). This formal framework for analyzing these cases has been accepted by the Ninth Circuit Court of Appeals. See, e.g., *Zurn Industries v. NLRB*, 680 F.2d 683, 686–693 (9th Cir. 1982), and the earlier cases cited therein from the Ninth Circuit.[16]

The evidence here convinces me that the Respondent's managers harbored a deeply held animosity toward the representation of its employees by a labor organization. The evidence is practically uncontradicted that Childress was visibly upset when he spoke to the sales staff on April 27, 3 days after he received the Union's petition for an election. The level of his emotional involvement with the issue is also vividly illustrated by Childress' own remarks equating the employees' action in seeking to be represented with divorce. The same is true of Hawthorne who became visibly disturbed at Vitale's remarks during the April 27 sales meeting, Majercin's admission that he was "deeply hurt" by the unionization effort, and finally Grobstein's remarks to the effect that Childress would close or sell the enterprise before he would deal with the Union. That the Respondent's managers were making a conscious effort to be hostile is reflected in Beian's conversations with Childress in early June when he told her "you asked for it" and again in early July when he clearly implied that things were going to change because of the Union. In short, the evidence is clear and unmistakable by the foregoing and numerous other actions and statements by the Respondent's managers that the employees' desire to be represented by a union poisoned the atmosphere at "the friendliest place in town." Moreover, the variety of evidence presented by the General Counsel demonstrates that the Respondent's management harbored this deeply held animus throughout the relevant period here from late April to at least early July. The nature of the animus expressed by the Respondent here serves as persuasive evidence of the Respondent's motive for the disciplinary actions which are questioned by the General Counsel.

Historically, the Childress dealership did not exhibit a harsh attitude toward its sales personnel. It is uncontradicted that the dealership's reputation as a place to work was regarded as a country club. Hawthorne could only recall four individuals who had been let go for their productivity in his 10 years as the sales manager and the convincing rebuttal testimony of Lee Burnt (one of the four) to the effect that he was told he was being laid off in order to protect the earnings of the older salespersons in the bad economic times casts a significant doubt over even that aspect of Hawthorne's testimony. Nevertheless, when this record is compared with the fact that in the 3-month period after the Union petitioned for an election, five of the Respondent's salespersons were placed on probation and two were discharged, it becomes evident that the Respondent made a major alteration in its per-

[16] A significant portion of the Respondent's brief is devoted to presenting the criticism of the Board's *Wright Line* test by other courts of appeals. On November 15, 1982, the U.S. Supreme Court agreed to review a case decided adversely to the Board's position in *Wright Line*. *NLRB v. Transportation Management Corp.* [103 S.Ct. 2496 (1983)]. In February 1983, the Board notified the Supreme Court that it had no objection to holding respondent's petition for certiorari in *Zurn* in abeyance pending the disposition of the *Transportation Management* case. In view of these developments, no useful purpose would be served by a lengthy discussion of the Respondent's arguments concerning *Wright Line's* allocation of the risk of nonpersuasion here.

sonnel practices. The General Counsel believes that this record merits the inference that this change in attitude which worked to the detriment of the five salespersons alleged to have been the subject of discriminatory treatment was due to the effort to secure union representation. By contrast, the Respondent contends that changes had to be made to stop its slippage in the ranking of Buick dealers in the western region. In my view, the General Counsel's argument is convincing and the Respondent's is not.

With respect to the Respondent's position, it should be observed at the outset that there is no evidence in this record that Buick officials were so concerned with the Respondent's early 1981 performance that they contemplated taking the drastic step of adding another dealership in the Phoenix area. And, even if the Respondent's overall performance had dipped so precipitously, the Respondent's recovery tactics were totally out of character. Instead of aiding and working with the members of the sales staff who were encountering difficulties as described by Childress in the April 27 sales meeting and in his July conversation with Beian, it is practically uncontradicted that the Respondent's managers adopted a hostile and abrasive demeanor in its dealings with the sales force. Moreover, the Respondent's largest decline actually occurred in January and February 1981, and there is no evidence of alarm until after the Union appeared on the scene in late April.

Noticeably absent from the testimony of the Respondent's managers is any claim that Reynolds and Vitale were not putting forth their best efforts to sell automobiles. Additionally, there is no evidence that Respondent ever utilized the probation device on any occasion prior to May 1 when Reynolds and Vitale were told they had 30 days to improve their production. Hawthorne's acknowledgment that he had not previously used the word probation in the circumstances found here is tantamount to an admission that the Respondent adopted and applied this device as a part of its promised effort to get tough with its sales employees. This conclusion is almost unavoidable where, as here, Reynolds and Vitale were placed on probation only 4 days after Childress expressed his deep hurt at the action of the sales employees and, in effect, promised retaliation.

A careful examination of the sales records for the first 4 months of 1981 would indicate that such action would have been more justified in January and February than at the beginning of May. As the General Counsel points out, March and April were Vitale's most productive months and during those 2 months he outsold some of the Respondent's other salesmen. Reynolds' selection for probation at the beginning of May is also inconsistent with the Respondent's prior practices. In the first 4 months of 1981, Reynolds sold more units than two other salesmen (Nixon and Vitale) and only one half a unit less than Leathers. See Appendix A. In addition, the General Counsel correctly notes that Reynolds' revenue was actually the fourth highest for the entire new-car sales staff.[17] The Respondent's effort to explain the anomaly which arose as a result of placing Reynolds on probation when he was generating such a significant amount of revenue albeit with fewer sales than several other salespersons was simply unsuccessful. According to the Respondent's argument, the key indicator of production among its sales personnel is the number of units sold rather than the amount of revenue generated. The Respondent's explanation that it was nervous about what Buick would do because of the decline in the number of new units sold is simply inexplicably inconsistent with the fact that it took no disciplinary action whatsoever against any member of its sales force when it suffered the greatest decline in unit production in the months of January and February. Moreover, the fact that the Respondent rewarded Reynolds in past years for his high production belies its assertion that it measures the production of its sales force on the basis of the units sold. As the General Counsel noted, in 1979, Reynolds was given an award for being the Respondent's number 3 salesperson. During that year, Reynolds sold fewer units than all new-car salespersons save one. However, the revenue generated on the units he sold was the third highest among the sales force. This productivity approach is also consistent with Hawthorne's remark to Reynolds in February that he was one of those selected to appear in the Respondent's TV commercials because he was among the top five salespersons.

The fact that Hawthorne went to such a protracted explanation of Childress' lack of involvement in the changing of the compensation plans at the time that he told Reynolds that he was being placed on probation strongly indicated that the principal concern on Hawthorne's mind at that time was Reynolds' leadership role in the organizational effort which stemmed directly from the change in the compensation plans. Similarly, Childress' two invitations to Reynolds to resign because he did not appear to be "happy" can only be regarded as a thinly veiled invitation to leave if he felt he had to be represented by a union. Apart from Reynolds' union activity there is simply nothing else which would indicate that Reynolds was not happy. In view of the foregoing and the Respondent's other contemporaneous, unlawful actions found in section B, above, I find that the Respondent adopted and implemented probation not as a legitimate disciplinary device but as a terror tactic designed to achieve the retaliation it promised employees who selected the Union to represent them. Having so concluded, I find that the Respondent violated Section 8(a)(1) and (3) of the Act by placing Reynolds, Vitale, Jonovich, Leathers, and Nixon on probation and by discharging Reynolds and Vitale as a direct result of the Respondent's use of the unlawful probation device.

With respect to the steak-fry cancellation, I find that this action was taken unilaterally by the Respondent as a direct result of the personal animosity its management officials felt toward the members of the sales staff for having selected the Union to represent them. Haw-

[17] The Respondent claimed in argument early in the hearing that comparisons between the new- and used-car salespersons are not valid measures of productivity.

thorne's assertion that the steak-fry was canceled by mutual consent is not credited where, as here, there is not one scintilla of corroborative evidence to support this assertion. Accordingly, I find the Respondent violated Section 8(a)(1) and (3) of the Act by canceling this event.

Similarly, as I have concluded that the reprimand of Reynolds and the back charging of his account for gasoline supplied to Cordovana was inconsistent with the practice theretofore and as no reprimand or discipline was meted out to Wubben, it is fair to infer, as I have, that this action also was motivated by Reynolds' union activity. Accordingly, I find this action also violated Section 8(a)(1) and (3).

However, I do not agree that the General Counsel has met the requisite burden of proof with respect to the allegation that the Respondent unlawfully discontinued assigning house deals to its sales force in retaliation for their protected activities. In this regard, the house deals were typically fleet sales arranged by the managerial staff and credited to the account of one of the salespersons. The result to the salesperson was a $25 commission and credit for a unit sold. Credit for fleet sales among the sales force was greatly reduced in June when the Respondent hired Jerry Smith as a fleet salesman. Between June and December 1981, there were 81 fleet sales. Forty-eight of these sales were credited to the four new salespersons hired by the Respondent in June, including 32 which were credited to fleet salesman Smith. My review of the distribution made of the remainder of the fleet sales simply fails to indicate any pattern which could be deemed to be discriminatory. Likewise, there is no evidence to support any contention that the Respondent's action in hiring a fleet salesman was grounded on anything other than a valid business judgment. Accordingly, I find that the evidence is insufficient to sustain the allegation concerning house deals set forth in paragraph 13 of the complaint and, therefore, it will be recommended that that allegation be dismissed.

V. THE REMEDY

Having found that the Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, the recommended Order will require that the Respondent cease and desist therefrom and take such affirmative action as will effectuate the purposes of the Act.

With respect to the affirmative remedial action, it will be recommended that the Respondent be ordered to offer Donald Reynolds and Frank Vitale immediate and full reinstatement to the former or substantially equivalent positions of employment, discharging if necessary any individuals hired after their termination, without prejudice to the seniority or other rights and privileges enjoyed by them prior to the discrimination found herein to have been practiced against them. It will be further recommended that the Respondent be ordered to expunge from its records any reference to the discriminatory terminations or probationary discipline found unlawful herein. *Sterling Sugars*, 261 NLRB 472 (1982). It will also be recommended that the Respondent be ordered to make Reynolds and Vitale whole for the losses which they suffered as a result of the discrimination found to have been practiced against them, including the reimbursement of Reynolds for the money deducted from his pay for the gasoline supplied in connection with the delivery of the Cordovana automobile in June 1981. The amount of any backpay due to the above-named employees shall be computed in the manner provided by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon as provided by the Board in *Olympic Medical Corp.*, 250 NLRB 146 (1980), and *Florida Steel Corp.*, 231 NLRB 651 (1977). And see generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). It will be further recommended that the Respondent be ordered to distribute a sum equal to the per employee expenditure for the steak-fry immediately preceding the steak-fry scheduled for May 1981, and unlawfully canceled, to each employee who would have been entitled to attend. Although I have concluded that the Respondent engaged in unlawful conduct by advising employees that it was rescinding the compensation plans placed in effect on April 1, the Respondent will not be required to implement the April 1 plans unless so requested by the Union. Finally, it will be recommended that the Respondent be ordered to post the notice to employees attached, as Appendix B, for 60 consecutive days in order for employees to be apprised of their rights and the outcome of this matter.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2) of the Act, engaged in commerce or in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By coercively interrogating its employees; by threatening its employees with the closure or sale of its business, or more onerous working conditions or refusal to sign a collective-bargaining agreement; by soliciting grievances of employees in circumstances showing that it was implicitly promising to take corrective action; and by advising employees that it was rescinding the compensation plans implemented on April 1, 1981, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By adopting and imposing periods of probation on Donald R. Reynolds, Frank Vitale, Keith Leathers, Thomas Jonovich, and Chuck Nixon; by terminating Donald R. Reynolds and Frank Vitale; by canceling the employee steak-fry scheduled for May 30, 1981; and by deducting money from Reynolds' pay for gasoline provided to customer Cordovana in June 1981, all in order to discourage employees from engaging in union activities, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. The General Counsel has failed to establish that the Respondent unlawfully created an impression that employee union activities were being kept under surveillance, that the Respondent unlawfully ceased distributing

house deals to its sales force in order to discourage union membership, or violated the Act in any other manner other than as found herein.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

The Respondent, Childress Buick, Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or refusing to reinstate employees; placing employees on probation; canceling employee social events which it sponsors; or deducting money from its employees' pay for supplies provided to customers in accord with its policy because of its employees' activities on behalf of Transport and Delivery Drivers, Warehousemen and Helpers Local Union 104, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union).

(b) Coercively interrogating employees; threatening employees with more onerous working conditions, the closing or sale of its business, or its refusal to sign a collective-bargaining agreement; and soliciting grievances or advising employees of changes in their compensation plans in order to discourage support for, or activities on behalf of, the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees because they choose to engage in activities on behalf of the Union.

2. Take the following affirmative action in order to effectuate the policies of the Act.

(a) Offer immediate and full reinstatement to Donald R. Reynolds and Frank Vitale and make them whole for the losses they incurred as a result of the discrimination against them in the manner specified in the section above entitled "The Remedy."

(b) Reimburse Donald R. Reynolds for the money deducted from his pay in connection with the gasoline supplied for the Cordovana auto in June 1981 as specified in the section entitled "The Remedy."

(c) Reimburse employees in the manner specified in "The Remedy" for the May 1981 steak-fry and reinstate April 1, 1981 pay plans as requested by the Union.

(d) Expunge from its records any reference to the unlawful termination or unlawful probation of Donald R. Reynolds, Frank Vitale, Keith Leathers, Thomas Jonovich, and Chuck Nixon.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports and all other records necessary or useful to a determination of the amount of backpay or other reimbursement due under the terms of this Order, the propriety of any offers of reinstatement, and the Respondent's compliance with subparagraph 2(d), above.

(f) Post at shop in Phoenix, Arizona, copies of the attached notice marked "Appendix B."[19] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that those allegations of the complaint which the General Counsel failed to prove are dismissed.

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[19] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX A

1981 Sales and Earnings

	January			February			March			April			Year To Date	
	New	*Used*	*Earn*[1]	*New*	*Used*	*Earn*	*New*	*Used*	*Earn*	*New*	*Used*	*Earn*	*Units*	*Earn*
Beian	5.0	-0-	$778	12.0	-0-	$1370	14.0	1.0	$1998	11.5	-0-	$1332	43.5	$5478
Bender	12.0	3.0	2172	16.5	3.0	2312	18.0	2.0	3189	14.5	2.0	2448	71.0	10121
Collins[2]	1.5	9.0	1949	2.0	9.0	2617	1.0	14.0	2803	-0-	8.5	1667	45.0	9036
Cooper	7.0	3.5	1032	13.5	2.0	1644	12.5	-0-	1932	(3)	(3)	(3)	38.5	4628
Couglin[2]	0.5	6.5	1867	-0-	13.0	3112	1.0	12.0	2785	-0-	5.0	1303	38.0	9067
Crider[2]	1.0	7.0	1854	-0-	10.0	1684	-0-	11.0	2166	1.0	6.0	1663	36.0	7367
Durham	7.0	-0-	1091	10.0	1.5	1677	16.5	1.0	2983	3.5	2.0	707	41.5	6458
Flietz[2]	-0-	12.0	2701	-0-	11.0	3254	0.5	10.0	2474	-0-	9.5	2658	43.0	11087
Goorhouse[2]	(3)	(3)	(3)	1.0	5.0	1599	4.0	8.5	2829	1.0	8.0	2188	27.5	6616
Gunsalus	14.0	-0-	1013	8.5	-0-	888	21.5	1.0	2476	10.0	-0-	862	55.0	5239
Jonovich[2]	1.0	7.0	1662	1.0	12.0	2246	1.0	11.5	1786	-0-	5.0	831	38.5	6525
Leathers	4.0	1.0	1080	12.0	2.0	1771	5.0	1.0	827	7.0	1.0	1035	33.0	4713

APPENDIX A—Continued

1981 Sales and Earnings

	January			February			March			April			Year To Date	
	New	*Used*	*Earn*[1]	*New*	*Used*	*Earn*	*New*	*Used*	*Earn*	*New*	*Used*	*Earn*	*Units*	*Earn*
Nixon	6.0	-0-	723	11.5	-0-	1255	7.5	-0-	135	7.0	-0-	1063	32.0	4276
Peterson	5.5	3.0	1876	20.5	0.5	3543	13.5	2.0	3280	12.0	1.0	2480	58.0	11179
Reynolds	6.0	1.0	1558	6.5	2.0	1691	8.0	1.0	1411	6.0	2.0	1337	32.5	5997
Thornson	10.5	1.0	1736	6.0	-0-	805	15.5	-0-	1788	6.0	-0-	486	39.0	4815
Vitale	3.0	-0-	500	5.0	1.0	693	13.0	2.0	2610	7.5	-0-	1015	31.5	4815

[1] Earnings are rounded to nearest dollar. Bonuses, awards, and contest earnings are excluded.
[2] Used-auto salesperson.
[3] No record.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge any employee, put any employee on probation, cancel social events which we sponsor, or deduct money from anyone's pay for supplies which we ordinarily provide to customers in order to discourage any of you from becoming or remaining members of Transport and Delivery Drivers, Warehousemen and Helpers Local Union 104, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

WE WILL NOT question you concerning your activities on behalf of, or desire for representation by, Local 104.

WE WILL NOT solicit your grievances in order to discourage you from seeking to be represented by Local 104.

WE WILL NOT threaten you with more onerous working conditions or the closure or sale of the dealership or with a refusal to sign a properly negotiated collective-bargaining agreement in order to discourage you from seeking representation by Local 104.

WE WILL NOT advise you that we are making changes in your compensation plan in order to discourage you from seeking representation by Local 104.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you because you exercise any of the rights guaranteed you by the National Labor Relations Act.

WE WILL offer to reinstate Donald R. Reynolds and Frank Vitale immediately to their former positions without prejudice to any rights which they enjoyed when they were employed by us and WE WILL pay to Reynolds and Vitale the backpay which the National Labor Relations Board finds to be adequate to compensate them for the losses which they suffered because we unlawfully discharged them or deducted from Reynolds' pay for gasoline which was supplied to a customer.

CHILDRESS BUICK